

those set forth in the prospectus, may be permitted only after solicitation of the amended concession opportunity for an appropriate period of time. Changes benefiting only the Government do not require solicitation. Concession contracts with anticipated annual gross receipts in excess of \$100,000 or of five (5) years or more in duration, shall be forwarded to the Congress pursuant to 16 U.S.C. 1a-7(c) prior to execution by the Director. The Director may, in his or her discretion, terminate the award of a concession contract at any time prior to execution by the Government and resolicit or cancel the solicitation. No offeror or other interested party shall be considered to have obtained compensable or other legal rights as a result of a resolicited or canceled solicitation or award of a concession contract.

(e) The terms and conditions of the solicitation must represent the requirements of the Director and not be developed to accommodate the capabilities or limitations of any particular party.

(f) Upon a written determination that exceptional circumstances warrant waiver of the procedures described in this subsection in the public interest, to protect visitor or park resources or otherwise, the Director may negotiate a concession contract with any qualified party without public notice or advertising.

[57 FR 40503, Sept. 3, 1992; 57 FR 46509, Oct. 9, 1992]

**§ 51.5 Solicitation and award of concession contracts where a right of preference exists.**

Except as follows, the procedures described in § 51.4 shall apply to the solicitation and award of concession contracts, including renewals and extensions of contracts, where an existing satisfactory concessioner is entitled to a right of preference to the contract:

(a) Prior to the issuance of a prospectus, the Director shall determine, based on annual evaluations conducted during the term of the contract, whether or not the existing concessioner has performed in a satisfactory, marginal, or unsatisfactory manner over the term of the contract. The annual evaluations shall be based on the conces-

sioner's operational performance as well as its compliance with the terms and conditions of the contract. In addition, if the concessioner is rated unsatisfactory in the year prior to the issuance of the prospectus, or marginal during the two years preceding the issuance of the prospectus, the concessioner's overall performance shall not be considered satisfactory. If the concessioner's overall performance over the term of the concession contract is determined to have been satisfactory, it is entitled to the preference in the renewal of its contract as described herein. However, if, after a prospectus which recognizes a right of preference is issued, a concessioner is rated pursuant to an annual evaluation as unsatisfactory by the Director, the Director shall cancel the solicitation or contract award and reissue the solicitation without a right of preference. A concessioner whose overall performance has been less than satisfactory as determined by the Director is not entitled to a right of preference. Additionally, if a concessioner has or will have operated less than two (2) consecutive years prior to the expiration of its contract as a result of acquiring, subsequent to the effective date of these regulations, a concession, or a controlling interest in a concession, as described in § 51.7(b) hereof, by a transfer, purchase, assignment, or otherwise, the concessioner shall not be entitled to a right of preference in the renewal of its contract. For the purposes of this section, the concessioner's first day of operation will be considered the date on which the Director approved in writing the acquisition in question. The Director may, in his or her discretion, grant an exception from this two (2) year provision if the Director determines that the transaction was a result of circumstances beyond the selling or transferring concessioner's control.

(b) A prospectus will be developed by the Director and will describe the existing satisfactory concessioner's right of preference, if any, as well as the material terms and conditions under which the Director proposes to award the contract.

(c) The concessioner with a right of preference shall be required to submit a responsive offer (a timely offer which

the Director determines meets the terms and conditions of the prospectus) pursuant to the prospectus. If the concessioner fails to do so, the right of preference shall be considered to have been waived and the contract shall be awarded to the party submitting the best responsive offer. If no other responsive offers were received, the concession opportunity shall be resolicited and no right of preference shall apply to the concession opportunity unless the concession opportunity is resolicited upon terms and conditions that are substantially different from the terms and conditions of the initial prospectus. Such award to another responsive offeror or resolicitation without a right of preference shall also occur where a concessioner with a right of preference is awarded a contract but fails to execute it within the time period established by the Director.

(d) All responsive offers received pursuant to a prospectus where a right of preference is applicable to the concession opportunity shall be evaluated on an equal basis. If an offer other than a responsive offer of the existing satisfactory concessioner is determined to be the best offer, the party submitting the best offer will be awarded the contract or permit, provided that the existing satisfactory concessioner shall be given an opportunity to amend its offer to meet the terms and conditions of the best offer. If the existing satisfactory concessioner does so within the period of time allowed by the Director, and its offer, as amended, is, in the judgment of the Director, at least substantially equal to the best offer and the existing concessioner is capable of carrying out its terms, the existing concessioner shall be selected for award of the contract upon the amended terms and conditions.

(e) The requirement for public notice and evaluation of offers received may not be waived.

**§ 51.6 Preferential right for additional services where a right to additional services and facilities exists by specific contract provisions.**

Where the Director seeks to authorize new or additional accommodations, facilities and services of generally the same character as provided by an exist-

ing satisfactory concessioner in a park area, and such concessioner by concession contract has a right to provide such additional services, the Director independently shall develop a description of the new or additional services and the terms and conditions upon which they are to be provided without reference to any private party, including the existing concessioner, and give the existing concessioner a reasonable opportunity to review such descriptions to determine if it wishes to provide the services. If so, the Director shall authorize the additional services by amendment to the concessioner's contract. If the existing concessioner does not agree to provide the additional services upon the terms and conditions described, the Director shall authorize the additional services to be provided by a new concessioner under substantially the same terms and conditions and pursuant to the procedures of § 51.4 hereof.

**§ 51.7 Sale, assignment or encumbrance of concession contracts and assets.**

(a) Concession contracts, or operations authorized thereby, controlling interests therein, or assets of a concessioner, may not be transferred, sold, assigned, or encumbered in any manner, including, but not limited to, stock purchases, mergers, consolidations, reorganizations, mortgages, liens or collateralization, except with the prior written approval of the Director. Such approval is not a matter of right to the concessioner. Transfers, sales, assignments, or encumbrances consummated in violation of this requirement shall be considered null and void by the Director and a material breach of the contract resulting in termination of the contract for cause.

(b) The term "controlling interest" as used herein means, in the case of corporate concessioners, an interest, beneficial or otherwise, of sufficient outstanding voting securities or capital of the concessioner or related entities so as to permit exercise of managerial authority over the actions and operations of the concessioner or election of a majority of the Board of Directors